20-463

Filed

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~320~~ 47

JACOB LYON, PLAINTIFF IN ERROR,

vs.

MARIE A. N. POLLARD.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED DECEMBER 4, 1872.

Oct. Y 1874

SUPREME COURT OF THE UNITED STATES.

No. 320.

JACOB LYON, PLAINTIFF IN ERROR,

vs.

MARIE A. N. POLLARD.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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2 The answer of the chief justice and justices of the supreme court of the District of Columbia within named.

The record and proceedings whereof mention is within made follow in these words, to wit:

Declaration.—Filed 13th December, 1870.

In the supreme court of the District of Columbia, the 9th day of December, in the year 1870.

MARIE A. N. POLLARD
vs.
JACOB LYON. } At law. No. 7960.

The plaintiff sues the defendant for heretofore, to wit: On the first day of November, 1869, at the city of Washington, in the District of Columbia, by a certain agreement then and there made between the said
3 defendant, of the first part, and the said plaintiff, under the name of Mrs. E. A. Pollard, of the second part, it was witnessed as follows:

"This agreement, made this first day of November, 1869, by and between J. E. Lyon, of the first part, and Mrs. Edward A. Pollard, of the second part, witnesseth: That the party of the first part agrees to open the buildings located on the S. W. corner of 9th and F streets, in this city, as a hotel, to be called the "St. Cloud;" that he will furnish it, and pay all bills incurred in carrying on said hotel.

"The party of the second part hereby agrees to take the superintendance of the same, in consideration of which she will receive one-fifth of the net income of said hotel, excluding rent as an item of expenses.

"And it is mutually agreed by and between the said parties that there shall be a monthly settlement made between the 1st and 5th of each
4 month of the said business, and that all moneys over and above the current expenses of the said hotel that it may have been necessary to pay during the month, and the one-fifth interest previously mentioned, shall be paid to the party of the first part, his heirs and assigns.

"And it is further mutually agreed upon that this agreement may be terminated, and this instrument shall become null and void, by either party giving a notice in writing to the other to that effect, to take effect thirty days from the date of said notice." And the plaintiff avers that after the making of the said agreement, to wit, on the first day of November, 1869, the plaintiff entered upon the business of superintending said hotel according to the terms of the said agreement, and so continued to superintend the same for a long time, to wit, until about the 4 day of October, 1870, and that she was ready and willing to continue to superintend the said hotel according to the provisions of
5 the said agreement, but the said defendant did not, nor would not, allow the plaintiff to continue the superintendance of the said hotel until the expiration of the thirty days after notice in writing by the said defendant of his intention to put an end to the said contract, but on the contrary, the defendant wholly neglected to give the plaintiff notice of his intention to terminate the said agreement, and then and there, to wit, on the day of , refused to suffer the said plaintiff to continue to superintend the said hotel, and refused to allow

the said plaintiff to receive the said one-fifth of the said net income, excluding rent as an item of expense, and then and there forcibly and fraudulently ejected the plaintiff from the said hotel, and has ever since refused to allow the plaintiff to superintend the said hotel or to receive one-fifth of the said net income, excluding rent as an item of expense, or any part of the same.

6 Whereupon the plaintiff says she is injured and has sustained damage to the amount of $2,000.00, and thereupon she brings suit.

DREW & BRADLEY, J'R,
Att'ys for Pl'ff.

The defendant is to plead hereto on or before the first special term of the court, occurring twenty days after service hereof; otherwise judgment.

DREW & BRADLEY, J'R.

Summons.—Issued December 13, 1870.

In the supreme court of the District of Columbia, the 13th day of December, 1870.

MARIE A. N. POLLARD, PLAINTIFF,
v.
JACOB LYON, DEFENDANT. } At law. No. 7960.

The President of the United States to the defendant, greeting:

7 You are hereby commanded to appear in this court on the first day of its special term, occurring twenty days after service of this writ on you, to answer the plaintiff's suit, and show why he should not have judgment against you for the cause of action stated in his declaration.

Witness, D. R. Cartter, chief justice.

R. J. MEIGS,
Clerk.

[SEAL OF COURT.]

DREW & BRADLEY.

NOTE.—The special terms of the court commence on the first Tuesday of every month except August, in which month there is no term of the court.

On back: Served copies of the declaration, notice to plead, and this summons, on the defendant, the 13th day of December, 1870.

ALEX'R SHARP,
Marshal, D. C.

Pleas.—Filed January 14, 1871.

MARIE A. N. POLLARD
vs.
8 JACOB LYON. } At law. No. 7960.

The defendant, for pleas, says:

1. That he did not undertake and promise as alleged.
2. That he did not commit the alleged breaches of contract.

W. D. DAVIDGE,
Att'y for Def't.

Joinder of issue.—Filed January 16, 1871.

In the supreme court of the District of Columbia.

MARIE A. N. POLLARD
v.
JACOB LYON. } At law. No. 7960.

The plaintiff joins issue upon the first and second pleas of the defendant.

BRADLEY & BRADLEY AND DREW, *for Pl'ff.*

Note of issue. Filed January 16, 1871.

In the supreme court of the District of Columbia.

9 MARIE A. N. POLLARD
v.
JACOB LYON. } At law. No. 7960.

Bradley & Bradley and Drew, for pl'ff.
Davidge & Washington, for defendant.
Last pleading filed in the above cause January 16, 1871.

BRADLEY & BRADLEY AND DREW, *for Pl'ff.*

To the Clerk.

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court for said District, commencing the third Monday of October, 1871.

MONDAY, *October 16th*, 1871.

By order of Justice McArthur, presiding, the court is opened by proclamation of the marshal pursuant to the rule of court.

WEDNESDAY, *December* 27, 1871.

Session resumed pursuant to adjournment, MacArthur, justice, presiding.

MARIE A. N. POLLARD, PL'FF,
v.
10 JACOB E. LYON. } At law. No. 7960. Cal. 269.

And now come as well the plaintiff, by her attorneys, Messrs. Bradley & Riddle, as the defendant, by his attorneys, Messrs. Davidge & Cox, and a jury of good and lawful men of this district, to wit: William T. Doniphan, William Fletcher, John J. Pfuger, Christian F. Schmidt, Robert A. Griffin, Charles Wilson, William Lee, Joseph Redfern, Henry B. Walker, James B. Holledge, William H. Langley, and Francis A. Jones, who, being sworn to try the issue above joined, on their oath say they find the issue aforesaid in favor of the plaintiff, and that the money payable to her by the defendant, by reason of the premises, is the sum of one thousand dollars besides costs. Defendant gives notice of motion for a new trial.

Motion for a new trial.—Filed January 5, 1871.

Supreme court of the District of Columbia.

M. A. N. POLLARD
v.
J. E. LYON. } At law. 7960.

11 The defendant moves for a new trial in this cause upon the following grounds:

1. Errors of law by the justice presiding, in his rulings during the trial, and in his instructions to the jury as shown by the bills of exception.
2. Because the evidence is insufficient to support the verdict.
3. Because the damages assessed by the jury are excessive.

Dec. 27, 1871.

W. S. COX,
R. B. WASHINGTON,
Atty's for Def't.

SATURDAY, *January* 20, 1872.

Session resumed pursuant to adjournment, MacArthur, justice, presiding.

MARIE A. N. POLLARD, PL'FF,
v.
JACOB LYON, DEF'T. } At law. No. 7960. Cal. 269.

12 Upon argument of so much of defendant's motion for a new trial as is addressed to the discretion of the court, it is considered that the same be and is hereby overruled.

And thereupon the defendant files his six bills of exception to the rulings of the court on the trial of the cause, duly signed and sealed, and prays that they may be made a part of the record, which is accordingly done.

Defendant's bill of exception.

FIRST.

Supreme court of the District of Columbia.

MARIE A. N. POLLARD
v.
JACOB E. LYON. } At law. No. 7960.

At the trial of this cause the plaintiff, to maintain the issue on her part joined, read in evidence the contract declared on, in the terms set forth in the declaration, and gave parol evidence tending to show that the plaintiff went into possession under said contract on the 1st of November, 1868, and conducted the St. Cloud Hotel in her
13 own name, successfully, until about the fourth of October, 1870, when she was forcibly, and against, her will, taken from the hotel by the defendant and carried to the Government Hospital for the Insane, near Washington, where she was detained some six weeks; that

after she left the asylum she demanded to be restored to her rights and position under said contract, which the defendant refused.

The defendant then offered evidence tending to show that on the 11th of July, 1870, he caused a notice to be served on the plaintiff in the following form:

"Mrs. EDWARD A. POLLARD:

"MADAM: The agreement entered into by us on the 1st of November, 1869, (a copy of which I herewith enclose,) having proved to be neither agreeable or profitable, I have determined to bring to an end, believing such a course to be for our mutual advantage. I now, therefore, hereby give you thirty days' notice, required by the said agreement, that at its expiration the said agreement shall be terminated, and the said instrument shall be null and void.

"Respectfully, yours,

"J. E. LYON."

And on the 19th of September caused another notice to be served on her in the following form:

"Mrs. E. A. POLLARD.

"MADAM: On the 11th of July last I caused notice in writing
14 to be served upon you, which notice terminated the agreement between us. I now notify you that the time specified in that notice has fully expired, and that you are no longer superintendent of this hotel, and no longer entitled to the appellation of proprietress.

"Respectfully,

"J. E. LYON."

And that shortly after said date the plaintiff became and was deranged, and a proper subject for treatment in a lunatic asylum, and was removed to said asylum by the advice of her physicians, and that the hotel had yielded no profits at any time since it was opened; but the books of said hotel showing its receipts and expenditures were not offered in evidence, although they were in the custody of the defendant.

The defendant having given notice to the plaintiff's counsel, before the trial, that he proposed to prove a failure of the consideration to be rendered by the plaintiff under said contract, by reason of her incompetency, neglect, and misconduct, then further offered to prove that the conduct of the plaintiff while superintendent of said hotel under
15 said contract was such as to injure the reputation and interests of the house; to which the plaintiff's counsel objected, and the court sustained the objection; and to said ruling of the court the defendant, by his counsel, excepts, and prays the court to sign, seal, and enrol this his first bill of exceptions, which is accordingly done this 27th day of December, A. D. 1871.

ARTHUR MACARTHUR, [SEAL.]
Justice.

SECOND EXCEPTION.

The defendant then further offered to show that the plaintiff was addicted to the use of opiates to an extent disqualifying her for proper attention to the business of such a hotel; to which the plaintiff's counsel objected, and the court sustained the objection; and to such ruling of

the court the defendant's counsel excepts and prays the court to sign, seal, and enroll this his second bill of exceptions, which is accordingly done this 27th day of December, A. D. 1871.

16 ARTHUR MACARTHUR, [SEAL.]
Justice.

THIRD EXCEPTION.

The defendant then further offered to show that the plaintiff's mental condition is unsound, and had been so during her superintendance of said hotel; to which the plaintiff's counsel objected, and the court sustained the objection; and to such ruling the defendant, by his counsel, excepts and prays the court to sign, seal, and enrol this his third bill of exceptions, which is accordingly done this 27th day of December, A. D. 1871.

ARTHUR MACARTHUR, [SEAL.]
Justice.

FOURTH EXCEPTION.

The defendant having rested, the plaintiff offered rebutting evidence tending to show that after the service and expiration of the notice of July 11th, 1870, before mentioned, and also after said notice of September 19th, and up to the time of her being sent away by de-
17 fendant, the hotel continued to be conducted by the plaintiff in the same manner as before, and that the defendant by his acts and conduct had waived said notice of July 11th, and further read in evidence the following letters:

(Letters not on file.)

The plaintiff further offered evidence that the notice of July 11th was withdrawn and revoked, and then rested.

The defendant then offered surrebutting evidence to show that the said notice of July 11th was withdrawn only on conditions
18 which said plaintiff afterwards refused to comply with, and said notice was then renewed.

The defendant then prayed the court to instruct the jury as follows:

"That even if the notice of July 11, 1870, had been wholly withdrawn, the subsequent notice of September 19, 1870, read in evidence, if the jury find that the same was served on the plaintiff, was, in legal effect, a renewal of the former notice, and of itself operated to terminate said contract at the expiration of thirty days from its date," which the court refused, and to such refusal the defendant, by his counsel, excepts, and prays the court to sign, seal, and enrol this his fourth bill of exceptions, which is accordingly done this 27th day of December, A. D. 1871.

ARTHUR MACARTHUR, [SEAL.]
Justice.

FIFTH EXCEPTION.

19 The defendant then further asked the court to instruct the jury as follows:

"If the jury find, under the instructions already given, that the plaintiff has a right of action, she is not entitled to recover more than one-fifth of the nett profits of the defendant's hotel realised after her

removal therefrom, and in the absence of proof that any such profits were realized she is entitled only to nominal damages," which the court refused, and to such refusal the defendant, by his counsel, excepts, and prays the court to sign, seal, and enrol this his fifth bill of exceptions, which is accordingly done this 27th day of December, A. D. 1871.

ARTHUR MACARTHUR, [SEAL.]
Justice.

SIXTH EXCEPTION.

And the court then charged the jury as follows:

If upon these instructions you find a verdict in favor of the plaintiff, the question of damages will then occur. The plaintiff will at all
20 events be entitled to nominal damages, which will be a barren victory for her. The contract provides that she shall be compensated by one-fifth of the net income of the business of the hotel. In the meantime, of course, she is to reside in the hotel and have the benefit of her maintenance there; the defendant is to furnish the means of defraying the expense, and would, therefore, be bound to pay the bills of the establishment if its receipts were inadequate for that purpose. Now, I am asked to instruct you that she cannot recover more than one-fifth of the net earnings of this business, and that is undoubtedly the rule of damage. She cannot recover more in this action for the breach of the contract than the contract itself provides she shall receive if the business had gone on. We are not informed here as to what the earnings of this hotel were at any time; and are, therefore, without that data upon which a very accurate judgment could be found. I am, therefore, requested to instruct you that, in the absence of any
21 such proof, the defendant would be entitled only to nominal damages. I think if you find in favor of the plaintiff you will not limit the rule. I will not limit the measure of damages as thus requested. I will leave it, gentlemen, under the testimony to your judgment. Mr. Lyon says that it was not a paying business. Mrs. Pollard says that it was a profitable business. Mr. Lyons says that the hotel had a very limited patronage. Mrs. Pollard says that sometimes it was full. This is about the only data we have, unless it was on one occasion when there was about three hundred dollars in the safe, and she took two hundred dollars with her, or something of that kind. If we had had the books here we would probably have been able to do more justice to this question of damage. It is true, those books were the books kept by herself; that is, they were kept by her agents during a large period of time, and she could have given notice here for their production, and the court would have compelled their production. It is equally true, from the testimony, that these books are in the possession of the defendant, and he was at liberty if he saw fit to *to* produce them without compulsion. Neither party has resorted to that species of evidence, although it was in the power of both of them to do so. Under these circumstances I will leave the question for you.

22 To which charge the defendant excepts, and prays the court to sign, seal, and enrol this 6th bill of exceptions, which is done this 27th day of December, 1871.

ARTHUR MACARTHUR, [SEAL.]
Justice.

23 *Appeal bond.*

In the supreme court of the District of Columbia, the day of , 1872.

MARIE A. N. POLLARD
vs.
JACOB E. LYON. } At law. No. 7960.

The defendant, having appealed to the general term from the judgment pronounced against him by the circuit court, on the day of , 1872, and Thomas Lewis, his surety, for themselves, and each of them, their, and each of their heirs, executors, and adm'istrators, appearing and submitting to the jurisdiction of the said general term, hereby undertake to abide by, perform, and pay its judgment, which they agree may be pronounced against all of them.

J. E. LYON.
THOMAS LEWIS.

Witness:
W'M F. MATTINGLY.

Approved Jan'y 22d, 1872.

MACARTHUR, *Justice.*

24 Proceedings before the supreme court of the District of Columbia, in general term, commencing on the third Monday, (15th day of April, 1872.) Present, Chief Justice Cartter and Justices Wylie, Humphreys, and MacArthur.

MONDAY, *April* 15, 1872.

The court commences its session by proclamation of the marshal, by order of the court.

FRIDAY, *May* 10, 1872.

Session resumed pursuant to adjournment. Present, Chief Justice Cartter and Justices Olin, Humphreys, and MacArthur.

MARIE A. N. POLLARD, PL'FF,
vs.
JACOB LYON, DEFENDANT. } At law. No. 7960.

And now again come here, as well the plaintiff as the defendant, by their respective attorneys, and thereupon, because it seems to the
25 court here that there is not in the record and proceedings of the circuit court any error, therefore it is considered that the defendant's motion for a new trial be, and the same is hereby, overruled, and that the plaintiff recover against the defendant one thousand dollars, the money in manner and form aforesaid found to be payable to her by the defendant, by reason of the premises, with interest thereon from the 27th day of December, 1871, the date of the verdict in the circuit court, and $ costs of suit, and have execution thereof.

Bond for writ of error.

Know all men by these presents that we, Jacob E. Lyon and Thomas Lewis, are held and firmly bound unto Marie A. N. Pollard in the full and just sum of two thousand dollars, to be paid to the said Marie A. N.

Pollard, her executors, administrators and assignes, to which payment, well and truly to be made and done, we bind ourselves, our heirs,
26 executors and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this 14th day of May, 1872.

Whereas said Jacob E. Lyon hath prosecuted a writ of error to the Supreme Court of the United States to reverse a judgment rendered against him by the supreme court of the District of Columbia, in a cause wherein said Marie A. N. Pollard is plaintiff and said Lyon is defendant:

Now the condition of the above obligation is such, that if the said Jacob E. Lyon shall prosecute his said writ with effect, and shall pay all costs and damages if he shall fail to make good his plea, then this obligation shall be void; it shall otherwise remain in full force and virtue at law.

J. E. LYON. [SEAL.]
THOMAS LEWIS. [SEAL.]

Witness:
W'M F. MATTINGLY.

The foregoing bond is hereby approved this 14th day of May, A. D. 1872.
D. K. CARTTER, *Chief Justice.*

27 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, greeting:

Because, in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between Marie A. N. Pollard, plaintiff, and Jacob Lyon, defendant, (No. 7960,) a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears; and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: Therefore, you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the United States, this 15th day of May, in the year of our Lord 1872, and of the Independence of the United States the 96th.

[SEAL.] R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

TO MARIE A. N. POLLARD:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Jacob Lyon is plaintiff and you are defendant, to show cause, if any there

be, why the judgment in the said writ of error mentioned should not be corrected so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

D. K. CARTTER, *Ch'f Just.*

Service acknowledged.
20 May, 1872.

JOS. H. BRADLEY, J'R.,
Att'y for Pl'ff.

(Indorsed:) 7960. Pollard v. Lyon. Original. Writ of error.

28 OFFICE OF THE CLERK OF THE SUPREME COURT
OF THE DISTRICT OF COLUMBIA,
November 16th, 1872.

I certify that the foregoing is truly copied from originals on file and of record in this office, which originals together constitute the record and proceedings of the said supreme court of the District of Columbia in the case mentioned in the writ of error to which this certificate is annexed.

Witness my hand and the seal of said court the day and year last aforesaid.

[SEAL.] R. J. MEIGS, *Clerk.*

(Indorsement on cover:) No. 320. Jacob Lyon, plaintiff in error, vs. Marie A. N. Pollard. District of Columbia. Sup. Court. Filed 4th December, 1872.

Supreme Court of the United States.

JACOB LYON, *Plaintiff in Error*,
v.
MARIE A. N. POLLARD. } No. 320.

Statement and Brief for Plaintiff in Error.

DAVIDGE & COX,
Counsel for ~~defendant.~~ Pltff in Error

S. & R. O. POLKINHORN, PRINTERS, D ST. NEAR SEVENTH.

Supreme Court of the United States.

JACOB LYON, *Plaintiff in Error*,
v.
MARIE A. N. POLLARD. } No. 320.

Statement and Brief for ~~defendant.~~ Plaintiff in Error

The declaration sets out an agreement in the following terms, viz:

"This agreement made this first day of November, 1869, by and between J. E. Lyon, of the first part, and Mrs. Edward A. Pollard, of the second part, witnesseth:

That the party of the first part agrees to open the buildings located on the S. W. corner of 9th and F streets, in this city, as a Hotel, to be called the St. Cloud; that he will furnish it and pay all bills incurred in carrying on said Hotel.

The party of the second part hereby agrees to take the superintendence of the same, in consideration of which she will receive one-fifth of the nett income of said Hotel, excluding rent as an item of expense.

And it is mutually agreed, by and between the said parties, that there shall be a monthly settlement made between the 1st and 5th of each month, of the said business, and that all moneys over and above the current expenses of the said hotel, that it may have been necessary to pay during the month, and one-fifth interest previously mentioned, shall be paid to the party of the first part, his heirs and assigns.

And it is further mutually agreed upon, that this agreement may be terminated, and this instrument shall become null and void by either party giving a notice, in writing, to the other to that effect, to take effect thirty day's from the date of said notice."

It avers that the plaintiff entered upon the superintendence of the hotel according to contract, and continued to superintend until the defendant, without giving her thirty day's notice, as the contract required, forcibly expelled her from the hotel and has ever since refused to allow her to continue as superintendent or to receive any of the profits.

The pleas are the general issue and a denial of the alleged breach.

Proof.

The material part of the plaintiff's proof was, that she went into possession under the agreement and conducted the hotel from the 1st of November, 1869, to about the 4th of October, 1870, when she was forcibly taken from the hotel by the defendant and carried to the government Insane Asylum, where she was detained about six weeks; that after she left the Asylum she demanded to be restored to her rights and position under the contract, which the defendant refused.

She gave no evidence as to the profits of the business.

The defendant offered proof, that on the 11th of July, 1870, he caused a notice to be served on the plaintiff, in the following form, viz:

MRS. EDWARD A. POLLARD, *Madam.*

The agreement entered into by us on the 1st of November, 1869, (a copy of which I herewith enclose,) having

proved to be neither agreeable or profitable, I have determined to bring to an end, believing such a course to be for our mutual advantage. I now, therefore, hereby give you thirty day's notice required by the said agreement, that at its expiration the said agreement shall be terminated, and the said instrument shall be null and void.

Respectfully yours,

J. E. LYON.

Washington, D. C., July 11, 1870.

And on the 19th of September, he caused the notice to be served on the plaintiff in the following form, viz:

ST. CLOUD HOTEL, *Washington, D. C.,*
September 19, 1870.

MRS. E. A. POLLARD, *Madam.*

On the 11th of July last, I caused notice in writing to be served upon you, which notice terminated the agreement between us. I now notify you that the time specified in that notice has fully expired, and that you are no longer superintendent of this hotel, and no longer entitled to the appellation of proprietress.

Respectfully,

J. E. LYON.

And that shortly after that date, the plaintiff became deranged, and was a proper subject for an Insane Asylum, and was removed to the Asylum by the advice of her physician, and that the hotel had yielded no profits since the plaintiff's connection with it.

The defendant having given notice to plaintiff's counsel before the trial that he proposed to prove a failure of the consideration to be rendered by the plaintiff under

the contract, offered to prove that the conduct of the plaintiff while she superintended the hotel, was such as to injure the reputation and interest of the house, but the court refused to admit it. This is the subject of the first exception, and is the first error now assigned.

The defendant then offered to prove that the plaintiff was addicted to the use of opiates to an extent that disqualified her for proper attention to the business of the hotel, but the court excluded the proof, and this is the subject of the 2nd exception, and is the second error assigned.

The defendant then offered to show that the plaintiff's mental condition was unsound during her superintendency of the hotel, but the court excluded the proof, and this is the subject of the 3d exception, and is the third error assigned.

The plaintiff offered rebutting evidence tending to show that the defendant, by his conduct, had waived the notices before referred to, and rested.

The defendant then asked the court to instruct the jury, that even if they should find the notice of July 11, 1870 to have been wholly withdrawn, the subsequent notice of September 19, 1870, if served on the plaintiff, was a renewal of the former, in legal effect, and itself operated to terminate the contract at the expiration of thirty days from its date.

The court refused to grant the instruction, and this is the subject of the 4th exception, and is the fourth error assigned.

A verdict was rendered for plaintiff for $1000, and a motion was made for a new trial on the bill of exceptions.

Points.

1. The evidence referred to in the 1st, 2d, and 3d exceptions ought to have been admitted. The plaintiff sues for a breach of contract, averring her own perfomance and readiness to perform. It is always admissible, in recoupment, to show a failure to perform according to contract, or a performance of such character as to be injurious rather than beneficial. It would not, for instance, gratify this contract, for the plaintiff simply to act as superintendent of the hotel, while at the same time her manners were so offensive to the guests as to drive them from the house, or, if her conduct was so immodest as to affect the reputation of the house and deter decent people from frequenting it; or, if she was so eccentric as to make the house disagreeable; in all such cases, while she literally performed the contract by superintending the hotel, yet such performance was not according to the true meaning and spirit of the agreement and could be shown in the reduction of any claim against defendant. The only condition is, that the plaintiff should not be taken by surprise by the evidence, which was avoided in this case by the notice before adverted to—

See Withers v. Greene, 9 Howard, 213.
Diggs v. Van Buren, 11 How., 461.
Winder v. Caldwell, 14 How., 434.

2. The court ought to have ruled as requested in regard to the effect of the notice of September 19, 1870, offered in evidence.

The agreement required no particular form of notice. It did not require that the notice itself should be expressed to take effect in thirty days, but gave that effect to any notice terminating the agreement; any notice

indicating the party's wish to end the arrangement was sufficient and became effective after thirty days. A notice to quit immediately would have such effect, but would not be void. Otherwise, although the wish of the defendant was perfectly well known, and the plaintiff has been out of the establishment for more than a year, she is still there and always will be, in legal contemplation, entitled to a share of the benefits, yet rendering nothing for them.

DAVIDGE & COX,
Counsel for defendant.

Supreme Court of the United States.

OCTOBER TERM, 1874.

JACOB LYON
v.
MARIE A. N. POLLARD. } No. 47.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Statement and Brief for defendant in error.

The declaration sets out an agreement in the following terms, viz:

"This agreement made this first day of November, 1869, by and between J. E. Lyon, of the first part, and Mrs. Edward A. Pollard, of the second part, witnesseth:

"That the party of the first part agrees to open the buildings located on the S. W. corner of 9th and F streets, in this city, as a Hotel, to be called the St. Cloud; that he will furnish it and pay all bills incurred in carrying on said hotel.

"The party of the second part hereby agrees to take the superintendence of the same, in consideration of which she will receive one-fifth of the net income of said hotel, excluding rent as an item of expense.

"And it is mutually agreed, by and between the said parties, that there shall be a monthly settlement made between the 1st and 5th of each month of the said business, and that all moneys over and above the current expenses of the said hotel that it may have been necessary to pay during the month, and one-fifth interest previously mentioned, shall be paid to the party of the first part, his heirs and assigns.

"And it is further mutually agreed upon that this agreement may be terminated, and *this instrument shall become null and void by either party giving a notice in writing* to the other to take effect thirty day's from the date of said notice."

It avers that the plaintiff entered upon the superintendence of the hotel according to contract, and continued to superintend until the defendant, without giving her thirty day's notice, as the contract required, forcibly expelled her from the hotel and has ever since refused to allow her to continue as superintendent or to receive any of the profits.

The pleas are the general issue and a denial of the alleged breach.

Proof.

The material part of the plaintiff's proofs was, that she went into possession under the agreement and successfully conducted the hotel from the 1st of November 1869, to about the 4th of October, 1870, when she was forcibly taken from the hotel by the defendant and carried to the Government Insane Asylum, where she was detained about six weeks; that after she left the Asylum she demanded to be restored to her rights and position under the contract, which the defendant refused.

The defendant offered proof that on the 11th of July, 1870, he caused a notice to be served on the plaintiff, in the following form, viz:

MRS. EDWARD A. POLLARD, *Madam.*

The agreement entered into by us on the 1st of November, 1869, (a copy of which I herewith enclose,) having proved to be neither agreeable or profitable, I have determined to bring to an end, believing such a course to be for our mutual advantage. I now, therefore, hereby give you thirty day's notice required by the said agreement, that at its expiration the said agreement shall be terminated, and the said instrument shall be null and void.

Respectfully yours,

Washington, D. C., July 11, 1870. J. E. LYON.

And on the 19th of September, he caused another notice to be served on the plaintiff in the following form, viz:

ST. CLOUD HOTEL, *Washington, D. C.,*

September 19*th*, 1870.

MRS. E. A. POLLARD, *Madam.*

On the 11th of July last I caused notice in writing to be served upon you, which notice terminated the agreement between us. I now notify you that the time specified in that notice *has fully expired*, and that *you are no longer superintendent* of this hotel, and no longer entitled to the appellation of proprietress.

Respectfully,

J. E. LYON.

And that shortly after that date the plaintiff became

deranged and was a proper subject for an Insane Asylum, and was removed to the Asylum by the advice of her physician, and *that the hotel had yielded no profits since it was operated*; but the books of said hotel showing its receipts and expenditures were not offered in evidence, although they were in the custody of the defendant.

The defendant having given notice to plaintiff's counsel before the trial that he proposed to *prove a failure of the consideration* to be rendered by the plaintiff under the contract, *offered* to *prove* that the *conduct* of the plaintiff while she *superintended* the *hotel was such* as to *injure* the *reputation* and *interest* of the *hotel*, but the court refused to admit it. This is the subject of the 1st exception.

The defendant then offered to prove that the plaintiff was *addicted to the use of opiates* to an *extent disqualifying her for proper attention to the business* of the hotel, but the court excluded the proof, and this is the subject of the 2d exception.

The defendant then offered to show that the plaintiff's mental condition is unsound and had been so during her superintendence of the hotel, but the court excluded the proof, and this is the subject of the 3d exception.

The plaintiff offered rebutting evidence tending to show that the defendant, by his conduct, had waived the notices before referred to, and rested.

The defendant then asked the court to instruct the jury that even if they should find the notice of July 11, 1870, to have been withdrawn or waived, the subsequent notice of September 19, 1870, if served on the plaintiff, was a renewal of the former in legal effect, and itself operated to terminate the contract at the expiration of thirty days from its date.

The court refused to grant the instruction, and this is the subject of the 4th exception.

The defendant further asked an instruction, that the plaintiff was not entitled to recover more than one-fifth of the net profits of the hotel realized after her removal from it, and that in the absence of proof of profits she was entitled only to nominal damages. The refusal of the court to grant this is the subject of the 5th exception.

The 6th and last exception is the Court's charge to the jury. See p. 7, Record.

Defendant's Brief.

The gist of the action is for the breach by the defendant of a contract between him and the plaintiff, for the services to be rendered, and which were rendered by the plaintiff in keeping a hotel for the defendant as his superintendent; her services to be paid with one-fifth of the profits of the hotel—the contract being determinable by either party upon thirty days' notice, in writing.

The proof shows that the "plaintiff went into possession under the contract, and successfully conducted the "hotel from the 1st of November, A. D., 1869, to about "the 4th of October, A. D. 1870, when she was forcibly "removed by the defendant."

The first, second, and third bills of exception rest upon the refusal of the court to admit as evidence of a failure of consideration on the part of plaintiff, testimony tending to show (*a*) "that the *conduct* of the plaintiff was such as "to injure the reputation and interest of the hotel;" (*b*) "that the plaintiff was addicted to the use of opiates to an "extent disqualifying her for proper attention to the business of the hotel;" (*c*) that the plaintiff's mental condition was unsound during her superintendence of the "hotel."

The contract between the plaintiff and the defendant

must control their respective rights embraced within its scope.

If the plaintiff failed to perform, it was in the power of the defendant to rescind the contract, and perhaps the best evidence of the plaintiff's performance is the fact of its non-recission by the defendant.

There can be no doubt the law will not allow a contract to bind one of two contracting parties, and not the other. If it is in writing, and a mode of putting an end to it is provided, that mode must be followed. However imperfectly the plaintiff may have performed her duties, so long as the defendant chose to accept her performance, he is bound to pay her in the manner stipulated between them. He cannot avail himself of her labors for well nigh a year without making the compensation fixed by his own terms. Besides the offer in the first bill of exception was not to show that the plaintiff's conduct did in fact, injure the reputation and interest of the house, but was such as to injure the name.

The fourth exception is directed to the notices.

It is admitted that after the notice of July 11th, the plaintiff and defendant continued their relations to this contract as they previously existed, until the 4th of October following, when he forcibly removed her from the hotel.

The plaintiff, to rebut these notices, offered evidence tending to show a waiver by the defendant of the notice of July 11th, 1870.

It was purely a question of fact for the jurors to determine, and properly left to them. If they found it was waived by the defendant, it became extinct; and could

not be revived by the defendant. His claim is that he revived it more than two months thereafter.

Such a construction would operate to create a fraud upon the plaintiff.

The notice of the 19th September 1870, could not then have been made a renewal of its predecessor.

Nor is it a good notice operating of itself to terminate the contract at the expiration of thirty days from its date. It does not propose or pretend to be a notice to take effect at a future day, but sets up a former notice that the plaintiff was holding over against that notice after the term expired, and is, if anything, a demand of immediate possesion.

But assuming such to be its operation, it cannot avail the defendant, for the action is brought to recover damages for the breach of the contract by the defendant, and also for her share of the profits while she was in the hotel, as well as for her share of the profits after she was removed by the defendant; therefore this notice extending to 19 of October cannot affect her previously acquired rights, or her rights till thirty day's thereafter.

The 5th exception is as to the measure of damages.

The court instructed the jury that "she, the plaintiff, "cannot recover more than one-fifth of the net earn- "ings" (p. 7,) which is in legal effect the first branch of the defendant's prayer.

It was a question for the jury to determine from all the evidence what the one-fifth of the profits probably was.

The evidence was conflicting as to the amount of profits, as stated iu the charge of the court. Hence the court would have erred by taking that question from the jury, and instructing them, as prayed by the defendant, that the plaintiff could only recover nominal damages.